No. 82-1050

In the Supreme Court of the United States

OCTOBER TERM, 1982

CORRECTED COPY

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, APPELLANT

v.

ROBERT H. MATHEWS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ALABAMA

BRIEF FOR THE APPELLANT

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QUESTIONS PRESENTED

1. Whether Section 334(g)(1) of the Social Security Amendments of 1977, which creates an exception to the provision requiring that Social Security spousal benefits be reduced by the amount of government pension benefits, violates the equal protection component of the Due Process Clause of the Fifth Amendment because it incorporates a gender-based classification previously held unconstitutional in a different context.

2. Whether a severability clause that provides that if any part of Section 334(g)(1) is found invalid the section shall not be applied to any other person or circumstance is an unconstitutional usurpation of judicial power by Congress.

PARTIES TO THE PROCEEDING

Appellee represents a nationwide class composed of "all applicants for husbands' insurance benefits * * * whose applications * * * have been denied [on or after October 12, 1979] solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits" (J.S. App. 10a).

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OPINIONS BELOW

The opinion of the district court (J.S. App. 1a-9a) is not reported. The opinions arising out of the administrative proceedings (J.S. App. 13a-14a, 15a-22a, 23a-26a) are not reported.

JURISDICTION

The judgment of the district court (J.S. App. 27a-28a) was entered on August 25, 1982. The notice of appeal (J.S. App. 29a) was filed on September 21, 1982. On November 10, 1982, Justice Powell extended the time for docketing an appeal to and including December 20, 1982. The appeal was docketed on that date, and the Court noted probable jurisdiction on March 21, 1983. The jurisdiction of this Court rests upon 28 U.S.C. 1252.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are set out at J.S. App. 30a-34a.

STATEMENT

1. The Social Security Act provides spousal benefits for the wives, husbands, widows, and widowers of retired and disabled wage earners (42 U.S.C. (& Supp. V) 402 (b), (e), and (f); 42 U.S.C. (Supp. V) 402(c)). Spousal benefits are based on the earnings of the retired or disabled wage earner, and are available to persons age 62 or over who are entitled to either minimal or no old-age or disability benefits on their own account. Prior to December 1977, the Act imposed a dependency requirement on men seeking spousal benefits; under this standard, benefits were payable only if husbands or widowers could demonstrate dependency on their wage-earner wives for one-half of their support. Former 42 U.S.C. 402(c)(1)(C) and (f)(1)(D). Women, on the other hand, could qualify for benefits without having to satisfy a dependency requirement. 42 U.S.C. 402(b).

On March 2, 1977, this Court held that the one-half support requirement for widowers' benefits under former 42 U.S.C. 402(f) violated the equal protection component of the Due Process Clause of the Fifth Amendment. *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). Thereafter, on March 21, 1977, the Court summarily affirmed two district court decisions striking down the one-half support requirement for husbands' benefits. *Califano* v. *Silbowitz*, 430 U.S. 924 (1977); *Califano* v. *Jablon*, 430 U.S. 924 (1977).

Following these decisions, Congress amended the Social Security Act in December 1977. Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1509, 42 U.S.C. (Supp. V) 301 *et seq.* In light of this Court's rulings, Congress eliminated the one-half support eligibility requirements for widowers' and husbands' benefits. Section 334(b)(1) and (d)(1) of the Social Security Amendments of 1977, 42 U.S.C. (& Supp. V) 402 (c)(1) and (f)(1); see S. Rep. No. 95-572, 95th Cong., 1st Sess. 88, 93 (1977).[1]

[1] In addition to removing the one-half support requirement for husbands and widowers, the 1977 amendments also directed that

At the same time, Congress realized that elimination of the one-half support requirements would create a serious fiscal problem for the Social Security trust fund. Generally, a person entitled to two different Social Security benefits does not receive the full amount of both benefits; rather, the two benefits are offset against each other so that the primary Social Security payment is reduced by the amount of the second benefit. 42 U.S.C. 402(k)(3)(A).[2] In 1977, however, federal and state government pensions were not subject to the general offset provision of the Social Security Act, and therefore a recipient of such a pension could receive both the government pension and unreduced spousal benefits under the Social Security Act. Elimination of the one-half support requirements made substantial numbers of retired federal and state employees eligible for unreduced spousal benefits based on their spouses' earnings. "This result[ed] in 'windfall' benefits to some retired government employees." S. Rep. No. 95-572, *supra*, at 28. Congress estimated that these windfall benefits would cost the Social Security system approximately $190 million in 1979 (*ibid.*).

In order to reduce this fiscal drain, Congress included a "pension offset" provision in the 1977 amendments to the Act. Parallel to the already existing offset provision for dual Social Security benefits in 42 U.S.C. 402(k)(3)(A), this offset provision generally requires that spousal

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"the entire question of such gender based distinctions will be included in the 6-month study [by the Department of Health, Education, and Welfare] of proposals to eliminate dependency and sex discrimination provided by this legislation." H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 73 (1977). Subsequently, other gender-based distinctions were eliminated from the Act by the Social Security Amendments of 1983, Pub. L. No. 98-21, Sections 301-308, 97 Stat. 109-115; see H.R. Conf. No. 98-47, 98th Cong., 1st Sess. 140 (1983).

[2] For example, if an individual is entitled both to benefits on his own work account and to spousal benefits, the worker's benefit is paid in full, with spousal benefits limited to the amount, if any, by which those benefits exceed the worker's benefit.

benefits be reduced by the amount of certain federal or state government pensions received by the Social Security applicant.[3] Section 334(a)(2) and (b)(2) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402 (b)(4)(A) and (c)(2)(A). See S. Rep. No 95-572, *supra*, at 27-28. The offset applies to spousal benefits payable "on the basis of applications filed in or after the month in which this Act is enacted [December 1977]." Section 334(f) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. V) 402 note.

While the pension offset was a reasonable and equitable means of dealing with windfall spousal benefit payments to federal and state retirees who, prior to 1977, had no expectation of receiving them, Congress was concerned about the effect of the new offset provision on those persons—primarily women—who were already retired or soon would retire from government service and who had planned their retirements on the assumption that they would receive full unreduced spousal benefits. Faced with the prospect that this latter group of spouses would, through no fault of their own, be deprived of the benefits they had long expected to receive, Congress chose to exclude them from the pension offset requirement. Thus, Section 334(g)(1) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402 note, excepts from the operation of the pension offset those spouses eligible for a government pension prior to December 1982 who would have qualified for full spousal benefits under the Act "as it was in effect and being administered in January 1977." As noted above, in January 1977 the Act required men, but not women, to demonstrate dependency on their wage-earner spouses in order to receive spousal benefits.

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[3] Government pensions are subject to the offset if the employment upon which the pension is based was not covered under Social Security on the last day the individual was employed. Section 334 (a)(2) and (b)(2) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402(b)(4)(A) and (c)(2)(A).

The pension offset exception also contains a severability clause that states that "[i]f any provision of this subsection * * * is held invalid, the remainder of this section shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid." Section 334(g)(3) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402 note. The severability clause was enacted "so that if [the pension offset exception] is found invalid the pension-offset * * * would not be affected, and the application of the exception clause would not be broadened to include persons or circumstances that are not included within it." H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 71-72 (1977); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. 71-72 (1977).[4]

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[4] The pension offset exception in Section 334(g) applies to spouses who meet the January 1977 statutory requirements and were eligible for pension benefits prior to December 1982. By its terms, this exception expired on December 1, 1982. On January 12, 1983, a new pension offset provision was signed into law, which excepts from the offset an individual who becomes eligible for a public pension prior to July 1983 and who satisfies a one-half support dependency test. Pub. L. No. 97-455, Section 7, 96 Stat. 2501; see note 12, *infra*. In addition, on April 20, 1983, Congress enacted a revised pension offset that applies without any exception clause to individuals who become eligible to retire in or after July 1983; however, the amount of the offset is reduced from 100% to two-thirds of the public pension. Pub. L. No. 98-21, Section 337, 97 Stat. 131; see H.R. Conf. Rep. No. 98-47, 98th Cong., 1st Sess. 155 (1983); H.R. Rep. No. 98-25 (Pt. 1), 98th Cong., 1st Sess. 83, 176 (1983).

Neither the expiration of the original exception provision in Section 334(g) nor the enactment of the new exception and offset provisions serves to moot this case. The recent provisions do not supersede or repeal Section 334(g) but merely establish a new exception for people who become eligible for pension benefits subsequent to December 1982 and a new offset applicable to people who become eligible subsequent to June 1983. Section 334(g) still applies to claimants filing after November 1982 provided that they would have been eligible for a government pension prior to December 1982 if they had made a proper application for such benefits; women who qualified for a government pension prior to December 1982 but did not seek benefits at that time remain covered by

2. On November 18, 1977, appellee retired from employment with the United States Postal Service (J.S. App. 2a). His wife had retired from her employment four months earlier, and was fully insured under the Social Security Act (*ibid.*). It is undisputed that appellee was not dependent upon his wife for one-half of his support (*id.* at 20a; Mot. to Aff. 5-6).

In December 1977, appellee filed an application for husband's benefits on his wife's account (J.S. App. 2a). On March 23, 1978, the Social Security Administration informed appellee that he was entitled to husband's insurance benefits of $153.30 per month[5] but that this amount would be offset by his $573 per month Postal Service pension in accordance with the provisions of Section 334(b)(2) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402(c)(2) (J.S. App. 2a). No net spousal benefits were therefore payable to appellee.

Appellee sought reconsideration of the Social Security Administration's initial decision (J.S. App. 23a) and was subsequently granted a hearing before an administrative law judge. The ALJ concluded that the pension offset provision of the 1977 amendments applied in this case and that appellee did not fall within the terms of the pension offset exception in Section 334(g)(1) (42 U.S.C. (Supp. V) 402 note) because "[h]e was not receiving at least one-half of his support from his wife" (J.S. App. 20a). "Since claimant did not meet the dependency requirements of the law in effect in January of 1977, the government pension offset must be applied on a dollar-for-dollar

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Section 334(g) and therefore do not have to prove dependency. Furthermore, this case will determine eligibility to past spousal benefits and continued future spousal benefits for people subject to the 1977 amendments; for example, if the judgment below is affirmed, appellee (and the nationwide class he represents) will be entitled to unreduced spousal benefits for back periods and also to ongoing benefits in the future.

[5] Social Security Award Certificate, dated March 13, 1978 (Tr. 45). ("Tr." refers to the transcript of the administrative proceedings in this case.)

basis against the amount of his husband's benefits. Since his pension exceeds the amount of his husband's insurance benefits, nothing is payable to him" (*ibid.*). The decision of the ALJ was affirmed by the Appeals Council on October 11, 1979, and became the final decision of the Secretary of Health and Human Services (*id.* at 13a-14a).

3. Appellee thereafter brought this class action in the United States District Court for the Northern District of Alabama under Section 205(g) of the Social Security Act, 42 U.S.C. (Supp. V) 405(g). Contending that it was unconstitutional to apply the pension offset provision of the 1977 amendments against him and other nondependent men but not against similarly situated nondependent women, appellee sought a declaration that Section 334(g)(1)(B) of the Social Security Amendments of 1977 (42 U.S.C. (Supp. V) 402 note) violated the Due Process Clause of the Fifth Amendment. Appellee also asserted that the severability clause contained in Section 334(g)(3) of the 1977 amendments was unconstitutional. On August 11, 1982, the district court entered an order certifying a nationwide class composed of "all applicants for husbands' insurance benefits * * * whose applications * * * have been denied [on or after October 12, 1979] solely because of the statutory requirement that husbands must have received more than one-half of their support from their wives in order to be entitled to benefits" (J.S. App. 10a).

Two weeks later the district court entered an opinion (J.S. App. 1a-9a) and order (*id.* at 26a-27a) holding unconstitutional both the pension offset exception in Section 334(g)(1)(B) and the severability clause in Section 334(g)(3).* The district court noted that the Act

> as it existed in January 1977 required that a husband receive one-half of his support from his wife in

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* The district court subsequently stayed its order pending appeal to this Court (J.S. App. 12a).

> order to be entitled to husband's insurance benefits. In essence, therefore, the exception provides a five-year grace period for all women who retire within five years of the enactment, and for men who retire within five years of the enactment and who are economically dependent upon their wives.

J.S. App. 3a. Thus, "the exception to the pension offset provision differentiates between men (who must prove that they received at least one-half of their support from their wives in order to fall within the exception) and women (who need not prove any spousal support to fall within the exception)" (*id.* at 4a). This "gender-based classification," the court concluded, can be constitutional only if it " 'serve[s] important governmental objectives and [is] substantially related to achievement of those objectives' " (*ibid.*, quoting *Craig* v. *Boren*, 429 U.S. 190, 197 (1976)).

The district court recognized that the congressional purpose in enacting the pension offset exception was to protect the reliance interests of persons, primarily women, who planned their retirements from government service on the assumption that they would receive undiminished spousal benefits (J.S. App. 5a). The court nevertheless reasoned that protection of these reliance interests did not justify incorporating a gender-specific requirement into the pension offset exception. "Although the pension offset was enacted after the *Goldfarb* decision * * *, Congress, in requiring that men prove dependency, presumed that women would have relied upon the practices of the Social Security Administration, yet men would not have relied upon a decision of the Supreme Court" (*ibid.*).

The district court stated that the pension offset exception would be constitutional had Congress required both men and women to show dependency in order to obtain its benefits. However, "[a]lthough Congress considered proof of dependency as a requirement for all applicants seeking to fall within the five-year grace period, it rejected the proposal under the presumption that to require women as

well as men to prove dependency would create an administrative burden upon the system" (J.S. App. 5a-6a). The court found such efficiency considerations to be insufficient to save the statute, concluding that "administrative convenience is a wholly inadequate justification for gender-based discrimination" (*id.* at 6a). Because the court believed that "there is no rational basis for the discriminatory, gender-based classification contained in Section 334(g)(1)," it held that the "portion of the exception to the pension offset provision that requires a male applicant to prove that he received one-half of his economic support from his wife violates the equal protection guarantees of the due process clause of the fifth amendment" (J.S. App. 6a-7a; footnote omitted).

The district court next noted that Congress, "anticipat[ing] the likelihood that a court would declare the pension offset exception invalid" (J.S. App. 7a), specifically inserted a severability clause into the pension offset exception to prevent its application to non-qualifying claimants should the exception be held invalid in any respect (Section 334(g)(3), 42 U.S.C. (Supp. V) 402 note). The court remarked that "[t]he effect of this severability provision is that if any portion of the pension offset provision is stricken, then the pension offset will be applied to all government retirees, with no exceptions" (J.S. App. 7a). Notwithstanding the clear import of this provision, however, the court felt "compelled" to hold that the severability clause represents "an unconstitutional usurpation of judicial power by the legislative branch of the government" (*ibid.*).

The district court viewed the severability clause as an attempt by Congress "to mandate the outcome of any challenge to the validity of the [pension offset] exception by making such a challenge fruitless. Even if a plaintiff achieved success in having the gender-based classification stricken, he would derive no personal benefit from the decision, because the pension offset would be applied to all applicants without exception" (J.S. App. 8a). Moreover,

the court found the operation of the severability clause to be "in direct contravention of Congress' avowed intent to protect the expectation and reliance interests of those individuals who had retired or would retire within five years of enactment of the pension offset" (*ibid.*). Because giving effect to the severability clause would deny the benefits of the pension offset exception to everyone, the court concluded that "the severability clause is not an expression of the true Congressional intent, but instead is an adroit attempt to discourage the bringing of an action by destroying standing" (*ibid.*).

Reasoning that "[c]ommon sense dictates that in order to allow the elderly to plan their futures, Congress would choose not to destroy the five-year grace period of the pension offset exception" (J.S. App. 8a), the district court ordered that the pension offset exception be expanded to include nondependent husbands. Accordingly, it permitted appellee and all other class members to collect benefits without regard to the pension offset provision of the 1977 Social Security amendments (*id.* at 9a). The court recognized that its decision "will create a financial drain upon the Social Security fund" (*ibid.*), but it dismissed this consideration on the ground that "[t]he economic aspects of this case * * * cannot outweigh the importance of preserving fundamental constitutional values" (*ibid.*).

SUMMARY OF ARGUMENT

I.

As a matter of statutory construction, the exception to the pension offset provision incorporates the gender-based dependency test that existed in the Social Security Act prior to the decision in *Califano* v. *Goldfarb*, 430 U.S. 199 (1977). At the time of the *Goldfarb* decision, government retirees, unlike retirees in the private sector, were not required to have their retirement benefits offset against their Social Security spousal benefits. In light of *Goldfarb*, substantial numbers of government retirees became eligible for dual benefits that they had never ex-

pected to receive under the government pension and Social Security systems, and these "'windfall' benefits" (S. Rep. No. 95-572, 95th Cong., 1st Sess. 28 (1977)) threatened to impose a severe financial burden on the Social Security trust fund. To eliminate such windfall benefits and relieve the fiscal crisis faced by Social Security, Congress enacted the pension offset provision requiring that spousal benefits be reduced by the amount of the government pension.

In adopting this offset, however, Congress recognized the legitimate reliance interests of people who had retired or were about to retire and who had planned their retirements in the expectation of receiving both government pension benefits and unreduced Social Security spousal benefits. Congress therefore enacted the exception clause to exclude from the offset people who had retired or would retire within five years and who could meet the eligibility requirements "in effect and being administered in January 1977" (Section 334(g)(1) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. V) 402 note).

This statutory language and purpose make clear that the exception clause incorporates the gender-based dependency test of pre-*Goldfarb* law. The statute seeks to protect the reliance interests of retirees who had made their retirement plans in accordance with pre-*Goldfarb* law but to offset the dual pension and spousal benefits of retirees who first became eligible for Social Security payments in light of *Goldfarb*. Furthermore, the only reasonable explanation for the selection of January 1977 as the operative date in the exception clause is that Congress, mindful of the March 1977 decision in *Goldfarb*, intended to distinguish between people eligible under pre-*Goldfarb* and post-*Goldfarb* standards. Nondependent men, who were ineligible for spousal benefits prior to March 1977, had no reliance interest to be protected.

In addition, it would entirely defeat Congress' intent to eliminate windfall benefits and reduce the burden on

the Social Security trust fund if, as appellee contends, the pension offset exception were applicable to men as well as women without regard to dependency. Under appellee's reading, the exception would cover virtually all Social Security claimants who retire prior to December 1982, and essentially no one would be subject to the offset provision during that period. This interpretation would largely nullify the offset for five years and leave the Social Security system with the same financial difficulties that Congress intended the 1977 amendments to rectify. Moreover, appellee's interpretation, by treating the exception clause as nothing more than a specification of the effective date of the offset provision, both fails to attach any significance to the critical date of January 1977 in the exception and ignores the existence of a separate section expressly setting forth the effective date.

II.

Although the exception clause incorporates the gender-based dependency standard of pre-*Goldfarb* law, it does not violate the equal protection guarantee of the Due Process Clause. The exception serves the legitimate and important governmental objective of protecting the reliance interests of retirees who had planned their retirements under existing law. The validity and significance of such reliance interests are well established in a number of doctrines that "recogni[ze] that statutory * * * rules of law are hard facts on which people must rely in making decisions and in shaping their conduct." *Lemon* v. *Kurtzman*, 411 U.S. 192, 199 (1973) (plurality opinion). Given the unquestionable importance of Social Security benefits to people whose retirement plans were based on the extant provisions of the Act, Congress properly sought to "weigh[] the inequity" and "'avoid[] the "injustice or hardship"'" (*Chevron Oil Co.* v. *Huson*, 404 U.S. 97, 107 (1971); citation omitted) that enactment of the offset provision would otherwise have entailed for those who depended upon receiving unreduced spousal benefits.

In addition, the exception clause is substantially related to the achievement of this governmental objective. By incorporating the January 1977 eligibility standard, the exception clause is specifically and precisely tailored both to include people who could have expected to receive spousal benefits under pre-*Goldfarb* law and to exclude those who qualified for such benefits only as a result of the March 1977 decision in *Goldfarb*. Congress also limited the exception to a five-year transitional period in order to protect the reliance interests of people who were or soon would be retired and could not adjust their retirement plans to take account of the offset. And, finally, Congress rejected alternative approaches to the offset and exception provisions that it considered less desirable solutions to the problems confronting the Social Security system.

The statute thus represents a "reasoned analysis" by Congress (*Mississippi University for Women* v. *Hogan*, No. 81-406 (July 1, 1982), slip op. 7) of the need to accommodate the financial requirements of the Social Security trust fund and the reliance interests of retirees. Because it substantially serves an important governmental objective and is not based upon " 'archaic and overbroad' generalizations" about the roles of men and women (*Califano* v. *Goldfarb*, *supra*, 430 U.S. at 211 (plurality opinion)), the exception clause does not violate equal protection.

III.

The severability clause in the exception provision states that, in the event the exception is held invalid in any respect, the offset shall remain in effect but the exception shall be considered invalid in its entirety. The purpose of this severability clause is to ensure "that if [the exception] is found invalid the pension-offset * * * would not be affected, and the application of the exception clause would not be broadened to include persons or circumstances that are not included within it" (H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 72 (1977); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. 72 (1977)).

Contrary to the district court's conclusion, the severability clause is not "an unconstitutional usurpation of judicial power by the legislative branch of government" (J.S. App. 7a) or an "attempt to discourage the bringing of an action [to challenge the exception] by destroying standing" (*id.* at 8a). The issue of severability turns upon the intention of the legislature, and Congress was well within its recognized authority in expressing its intent in the severability clause.

Moreover, the validity of the severability clause does not bear on a plaintiff's standing to sue. Appellee was personally affected by operation of the gender-based statute, and this sufficed to give him standing. While the severability clause would govern the relief to which appellee might be entitled if he prevailed on the merits, it does not prevent him from seeking an adjudication of his rights.

In any event, even treating the question as one of standing, the severability clause does not deny standing to a plaintiff challenging the pension offset exception. First, a severability clause is an "aid in determining th[e] intent [of the legislature] * * * [and] not an inexorable command." *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924). In the end, it is the courts' duty to determine what remains of a statute once a portion has been declared unconstitutional; while the severability clause in this case is a strong indication of congressional intent, the possibility of a judicial award of spousal benefits was not so remote or inconceivable that a plaintiff would be without a colorable claim to benefits sufficient to confer standing. Second, and more important, even if no spousal benefits could be granted in light of the severability clause, a plaintiff still would have standing to assert his right to be free from impermissible gender-based discrimination under the Social Security Act. Hence, by having the gender-based pension offset exception declared invalid, a plaintiff would have fully vindicated his Fifth Amendment right to equal protection.

Finally, the district court improperly intruded upon legislative prerogatives by extending the exception clause to nondependent men in contravention of the congressional directive that, if the gender-based exception provision were invalidated, "the entire exception would become inoperative so that the * * * [offset] would be applied in all cases" (123 Cong. Rec. 39134 (1977) (remarks of Sen. Long)). It is for the legislature rather than the judiciary to make basic policy choices and allocate limited governmental funds. By distributing Social Security benefits in a way that Congress clearly foreclosed, the court exceeded proper judicial bounds and has reimposed the fiscal burden on the Social Security trust fund that Congress sought to avoid in 1977.

ARGUMENT

I. THE PENSION OFFSET EXCEPTION WAS INTENDED TO INCORPORATE THE GENDER-BASED DEPENDENCY STANDARD IN PRE-*GOLDFARB* LAW AND THEREFORE DOES NOT APPLY TO A NONDEPENDENT HUSBAND SUCH AS APPELLEE

Although appellee prevailed below on his constitutional arguments, he asserts in this Court (Mot. to Aff. 5-11) that the pension offset exception should be interpreted to apply to nondependent husbands and therefore to exempt him from the operation of the offset provision. Urging "the Court to construe the exception clause in a manner to avoid a constitutional issue" (*id.* at 7), he contends that "the exception clause should be construed as applicable to both male and female spouses without any reference to a gender-based dependency test" (*ibid.*). This contention is without merit. As the district court correctly understood,[7] the exception clause incorporates the

[7] See J.S. App. 3a, 4a, quoted at pages 7-8, *supra*. Most other courts that have addressed the issue have agreed that the exception clause incorporates the one-half support test in pre-*Goldfarb* law. See *Caloger* v. *Harris*, No. H-80-388 (D. Md. Mar. 25, 1981), slip

dependency standard in pre-*Goldfarb* law and thus does not exclude nondependent men from the offset provision.

Appellee relies upon the "maxim * * * of statutory construction" that "statutes should be construed to avoid constitutional questions * * *." *United States* v. *Batchelder*, 442 U.S. 114, 122 (1979). This maxim is not an inexorable command to ignore the evident meaning of a statute, however, and a "restrictive interpretation should not be given a statute merely because * * * giving effect to the express language employed by Congress might require a court to face a constitutional issue." *United States* v. *Sullivan*, 332 U.S. 689, 693 (1948). Rather, such a construction is to be rendered " 'only when [an alternative interpretation] is "fairly possible" from the language of the statute' " (*United States* v. *Batchelder*, *supra*, 442 U.S. at 122, quoting *Swain* v. *Pressley*, 430 U.S. 372, 378 n.11 (1977)). This rule does not "authorize[] a court in interpreting a statute to depart from its clear meaning" (*United States* v. *Sullivan*, *supra*, 332 U.S. at 693) or to " 'pervert[] the purpose of a statute * * *' or judicially rewrit[e] it" (*Aptheker* v. *Secretary of State*, 378 U.S. 500, 515 (1964), quoting *Scales* v. *United States*, 367 U.S. 203, 211 (1961)). Since, as we show below, "the statutory meaning and congressional intent are plain" (*City of Rome* v. *United States*, 446 U.S. 156, 173 (1980)), the Court should "reject the appell[ee's] suggestion that [it] engage in a saving construction and avoid the constitutional issues * * *."

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op. 3; *Duffy* v. *Harris*, No. 79-386 (D.N.M. Oct. 23, 1979), slip op. 3; *Miller* v. *Department of Health and Human Services*, 517 F. Supp. 1192, 1194 (E.D.N.Y. 1981); *Rosofsky* v. *Schweiker*, 523 F. Supp. 1180, 1184 (E.D.N.Y. 1981), prob. juris. noted, 456 U.S. 959, appeal dismissed, 457 U.S. 1141 (1982); but see *Webb* v. *Schweiker*, 701 F.2d 81 (9th Cir. 1983), petition for cert. pending, No. 82-2094 (filed June 21, 1983), discussed at note 15, *infra*; *Wachtell* v. *Schweiker*, No. 80-8022-Civ-ALH (S.D. Fla. Jan. 26, 1982), appeal pending, No. 82-5552 (11th Cir. filed Apr. 30, 1982).

As this Court has emphasized:

> [I]n all cases involving statutory construction, "our starting point must be the language employed by Congress," *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 337 (1979), and we assume "that the legislative purpose is expressed by the ordinary meaning of the words used." *Richards* v. *United States*, 369 U.S. 1, 9 (1962). Thus, "[a]bsent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive." *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980).

American Tobacco Co. v. *Patterson*, 456 U.S. 63, 68 (1982). Here, the statutory language "could not be more plain" (*Lewis* v. *United States*, 445 U.S. 55, 65 (1980)) that the pension offset exception does not apply to non-dependent men.

By its terms, the exception provides that the pension offset "shall not apply * * * to an individual * * * who * * * meets the requirements of th[e] subsection [under which spousal benefits are sought] *as it was in effect and being administered in January 1977*." Section 334(g)(1) of the Social Security Amendments of 1977, 42 U.S.C. (Supp. V) 402 note (emphasis added). It cannot be doubted that in January 1977—which was prior to this Court's decision in *Goldfarb*—the Social Security Act required men, but not women, to prove that they were dependent on their spouses for one-half of their support in order to be eligible for spousal benefits. Compare former 42 U.S.C. 402(b) with former 42 U.S.C. 402(c). Accordingly, the plain language of the exception provision requires appellee to satisfy the one-half support standard if he is to come within the exception to the pension offset.[8]

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[8] In addition, as noted above (see page 5, *supra*) and as discussed further below (see pages 43-45, *infra*), the exception provision contains a severability clause, designed with this specific statute in mind, to apply in the event that the exception itself is

The legislative history confirms Congress' intent to incorporate the pre-*Goldfarb* gender-based dependency test in the exception clause. The offset provision originated in the Senate and, as explained by the Senate Finance Committee, had the following purpose:

> Under present law, a woman can become entitled to spouse's or surviving spouse's benefits without proving dependency on her husband. As a result of a March 1977 Supreme Court decision [in *Califano* v. *Goldfarb*], a man can also become entitled to spouse's or surviving spouse's benefits without proving his dependency on his wife. * * * Under the social security program, an individual who is entitled to two benefits does not receive the full amount of both benefits. For example, if one is entitled to both a worker's benefit and a spouse's benefit, the full worker's benefit is paid first and then the amount (if any) by which the spouse's benefit exceeds the worker's benefit. This "dual-entitlement" provision prevents payment of dependents benefits to some persons not truly dependent. *However, persons who receive civil service pensions based on their work in non-covered employment and are entitled to social security spouses' benefits, receive their spouses' benefits, in full, regardless of their dependency on the worker. This results in "windfall" benefits to some retired government employees.*
>
> The committee recommends that social security benefits payable to spouses and surviving spouses be reduced by the amount of any public (Federal, State, or local) retirement benefit payable to the spouse. * * * In general, this should assure that dependents' social security benefits will not be paid to persons not dependent on the worker.

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found invalid. The only plausible basis for this unusual measure is that, contrary to appellee's contention, Congress intended the exception to incorporate, for purposes of the offset provision, the gender-based dependency standard that *Goldfarb* had held unconstitutional in a different context.

S. Rep. No. 95-572, 95th Cong., 1st Sess. 27-28 (1977) (emphasis added).[9]

This problem of "windfall" benefits was greatly exacerbated by the *Goldfarb* decision, which substantially increased the number of government employees eligible for dual benefits under civil service pensions and the spousal provisions of the Social Security Act. The situation was explained by Robert M. Ball, a former Commissioner of Social Security:

> *Windfall benefits to husbands and widowers should be prevented*
>
> The princip[al] effect of the March 1977 Supreme Court decisions granting benefits to husbands and widowers under the same conditions as those previously applicable to wives and widows (that is without a specific test of dependency) is to make eligible for social security benefits *a substantial number of men* who have worked for the federal government * * * and whose wives have worked under social security. Very few of these men are in any real sense the economic dependents of their wives, and payment of benefits to them as dependents—in addition to paying them pensions earned in government employment—*costs money and leads to unreasonable results.* If the men were covered by social security as well as by the government retirement systems, the dual benefit provisions of the Social Security Act would almost always prevent them from receiving husbands' or widowers' benefits. * * * [*T*]*he Social Security Act should be amended to prevent payment of benefits in the cases described.*

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[9] The bill that became the Social Security Amendments of 1977 initially began in the House and did not contain an offset provision. However, the Senate substituted its proposal on a pending bill for the House version of the amendments (see 123 Cong. Rec. 36435, 36446 (1977) (remarks of Sen. Long); *id.* at 39132 (remarks of Sen. Long)), and the Senate offset provision, as modified in Conference to include the exception clause, was enacted into law. S. Rep. No. 95-572 is the Committee Report on the Senate substitute.

Social Security Financing Proposals: Hearings Before the Subcomm. on Social Security of the Senate Finance Comm., 95th Cong. 1st Sess. 117 (1977) (emphasis added) (hereinafter "*Senate Hearings*"); *President Carter's Social Security Proposals: Hearings Before the Subcomm. on Social Security of the House Ways and Means Comm.*, 95th Cong., 1st Sess., Pt. 1, 158 (1977) (emphasis added) (hereinafter "*House Hearings*").[10]

Congress adopted the pension offset provision in an effort to reduce the tremendous financial burden on the Social Security trust fund arising from such "[w]indfall benefits" to the "substantial number of men" made newly eligible for spousal benefits by the *Goldfarb* decision. Congress estimated that the offset would prevent additional expenditures of $190 million in fiscal year 1979 (S. Rep. No. 95-572, *supra*, at 28). And of these savings, approximately 90% was attributable to reductions in payments to nondependent husbands and widowers who had become entitled to spousal benefits by the decision in *Goldfarb* (S. Rep. No. 95-572, *supra*, at 81).

In enacting the offset provision, however, Congress became concerned about the elimination of Social Security benefits for people—primarily women—who had retired or soon would retire and who had planned their retirements in reliance on the prior law. This group of people had long been eligible to receive unreduced spousal benefits in addition to government pension benefits. Accordingly, Congress exempted from the offset provision "certain people who are already receiving pensions based on noncovered public employment (or who would be eligible for such pension within 5 years of the month of enactment) and *who could have expected to receive social*

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[10] See also 123 Cong. Rec. 37196 (1977) (remarks of Sen. Bellmon) ("[t]he bill would partially correct the double-dipping problem"); H.R. Rep. No. 95-702, 95th Cong., 1st Sess. 302 (1977) (minority views); *House Hearings*, *supra*, at 121 (statement of Wilbur J. Cohen); *id.* at 136, 140 (statement of Robert J. Myers); *id.* at 566 (statement of Rep. Fraser).

security benefits as dependents or survivors under the social security law as in effect on January 1, 1977." H.R. Conf. Rep. No. 95-837, 95th Cong., 1st Sess. 72 (1977) (emphasis added); S. Conf. Rep. No. 95-612, 95th Cong., 1st Sess. 72 (1977) (emphasis added). As the Conference Report explained:

> The managers are concered that there may be large numbers of women, especially widows in their late fifties, who are already drawing pensions, or would be eligible to draw them within 5 years of the date of enactment of this bill, based on their non-covered work and *whose retirement income was planned for on the assumption of the availability of full wife's or widow's benefits under social security. Inclusion of this exception to the* * * * [*offset*] *provision, reinforces its prospective nature and avoids penalizing people* who are already retired, or close to retirement, from public employment and *who cannot be expected to readjust their retirement plans to take account of the "offset" provision that will apply in the future.*

H.R. Conf. Rep. No. 95-837, *supra*, at 72 (emphasis added); S. Conf. Rep. No. 95-612, *supra*, at 72 (emphasis added).[11]

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[11] See also S. Rep. No. 95-572, *supra*, at 81 (Congressional Budget Office analysis that, under the offset, "[t]hose husbands and widowers * * * who had newly become eligible for benefits as a result of the Goldfarb decision would lose their eligibility for those benefits if they had not filed before [the effective date of the amendments]"); Staff of Senate Comm. on Finance, 95th Cong., 1st Sess., *Summary of H.R. 9346, the Social Security Amendments of 1977 as Passed by the Congress (P.L. 95-216)* 7 (Comm. Print 1977) (hereinafter *"Senate Comm. Print"*) ("To assure that persons who have been counting on these benefits for many years and who are now at or nearing retirement age will not be adversely affected, H.R. 9346 includes a transitional exception under which certain individuals will not have their social security benefits as spouses reduced by the amount of their public pension. This exception applies to those who * * * would qualify for spouses benefits under social security under the law as in effect and as administered in January 1977"); Staff of the House Comm. on Ways and Means, 95th Cong., 1st Sess.,

The same explanations were reiterated in the legislative debates on the Conference Report. For example, Representative Ullman, the Chairman of the House Committee on Ways and Means and principal manager of the bill in the House, clearly explained that claimants made eligible by the *Goldfarb* decision would be subject to the offset provision and would not be exempted by the exception clause:

> The court decision put a lot of new people in. *Those people who are newly brought in will come under the offset* but those people who were eligible or who will be eligible in the next 5 years will not. * * *
>
> * * * * *
>
> *The Goldfarb decision made an awful lot of new people eligible for husbands' and widowers' benefits and what this [offset] provision does is it keeps the new people from going on, but for those people who were eligible under the old system, we have delayed the implementation of this for 5 years.* Anybody who becomes eligible in 5 years, will get an exemption from this inclusion and will be able to draw both.

123 Cong. Rec. 39008 (1977) (emphasis added). Likewise, Representative Harris, in opposing the bill, objected that "it is unfair and discriminatory against men to require only men who receive public pensions to prove their

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WMCP: 95-61, Summary of the Conference Agreement on H.R. 9346, at 5 (Comm. Print 1977) (hereinafter "*House Comm. Print 95-61*") ("[the] exception under which the offset provision would not apply * * * is to protect those persons who were expecting a social security dependency benefit based on their spouse's record"); Staff of the Subcomm. on Social Security of the House Ways and Means Comm., 95th Cong., 2d Sess., *WMCP: 95-72, The Social Security Amendments of 1977 (Public Law 216, 95th Congress)*, at 5 (Comm. Print 1978) (same); *id.* at 28 ("exception * * * provides that the reduction will not apply to those who * * * could qualify for social security dependent's benefits if the law as in effect, and as being administered, in January 1977 remained in effect"). Congress estimated that the pension offset provision with the exception clause would save $106 million in calendar year 1979 (*Senate Comm. Print, supra*, at 17; *House Comm. Print 95-61, supra*, at 10).

'dependency' * * *" (123 Cong. Rec. 39024 (1977)); as he noted:

> The apparent rationale for the offset provision is that men who receive public pensions will get some sort of a "windfall" if they are also allowed to receive social security dependent's benefits, and that since they might not be "truly dependent," they must be able to "prove" their dependency in order to get a permanent exemption from the offset provision.

Ibid. See also *id.* at 39031-39032 (remarks of Rep. Bingham).

Finally, the clearest statement of congressional intent to incorporate pre-*Goldfarb* law into the exception clause is found in the summary of the Conference provisions presented by Senator Long, the Chairman of the Senate Finance Committee and principal manager of the bill in the Senate. As Senator Long explained, the exception clause was intended "to afford * * * *protection to those who anticipated receiving their spouses benefits prior to March 1977 without providing it also to those [who] would qualify only as a result of a March 1977 court decision* * * *." 123 Cong. Rec. 39134 (1977) (emphasis added). The same explanation was repeated in the Senate Finance Committee's analysis of the legislation as enacted. See Staff of the Senate Comm. on Finance, 95th Cong., 1st Sess., *Summary of H.R. 9346, the Social Security Amendments of 1977 as Passed by the Congress (P.L. 95-216)* 7 (Comm. Print 1977) (hereinafter *"Senate Comm. Print"*).[12]

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[12] This understanding of the exception clause is confirmed by the legislative history of the new offset provision recently enacted by Congress. See note 4, *supra*. The new provision exempts from the offset an individual who becomes eligible for a public pension prior to July 1983 if "that individual is dependent upon his or her spouse for one-half support." H.R. Conf. Rep. No. 97-985, 97th Cong., 2d Sess. 13 (1982). The House Conference Report, in comparing the new provision with Section 334(g), noted that Section 334(g) provides an exception only for those claimants who meet "the require-

Two fundamental conclusions emerge clearly from this legislative history, and they require rejection of appellee's construction of the pension offset exception. First, the offset provision was intended to eliminate the windfall benefits and relieve the financial burden on the Social Security trust fund that resulted from this Court's decision in *Goldfarb*. Second, mindful of the March 1977 decision in *Goldfarb*, Congress designed the exception clause—including its operative date of January 1977—to protect the reliance interests of people who had planned their retirements on the basis of pre-*Goldfarb* law but to exclude those whose claims for spousal benefits depended upon *Goldfarb* and who therefore could not have expected

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ments for entitlement as they were in effect and being administered in January 1977" (H.R. Conf. Rep. No. 97-985, *supra*, at 13). As the Report summarized the governing 1977 law (*id.* at 12-13; emphasis added):

> Prior to 1977, social security spouse's benefits were available only to men, who could meet a dependency test and to women, all of whom were presumed to be dependent. These provisions were declared in March 1977 (*Califano* v. *Goldfarb*) unconstitutional since they applied differently to men and women.
>
> * * * * *
>
> *The law in January 1977 required men, but not women, to prove they were dependent on their spouses for at least one-half of their support in order t[o] qualify for the spouse benefit.*

By contrast, the new pension offset provision "would be applied *according to the pre-1977 law, except that it would apply to both men and women*" (*id.* at 13; emphasis added). See also 128 Cong. Rec. H10674 (daily ed. Dec. 21, 1982) (remarks of Rep. Archer) (emphasis added) (Section 334(g) "exclude[d] from th[e] offset both *women and dependent husbands* who had reason to plan for such benefits under prior law"). These recent interpretations by Congress are "entitled to significant weight" (*Seatrain Shipbuilding Corp.* v. *Shell Oil Co.*, 444 U.S. 572, 596 (1980); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974)), and they are consistent with and reinforce the original congressional intent that Section 334(g) incorporate the pre-*Goldfarb* gender-based standard to allow only women and dependent men to come within the exception provision.

to receive retirement benefits from both the civil service and Social Security systems prior to that decision.[13]

Appellee's interpretation of the statute is irreconcilably at odds with both of these congressional purposes. By making men as well as women subject to the exception clause without regard to the one-half support requirement, appellee would largely vitiate the offset provision for the designated five-year period and would leave the Social Security system in the same fiscal plight that prompted congressional action in the first place; in fact, under appellee's position, the exception clause would apply to essentially all applicants prior to December 1982, and virtually no one would be subject to the offset provision during that period. Contrary to appellee's reading of the exception clause, there is no basis to "'imput[e] to Congress a purpose to paralyze with one hand what it sought to promote with the other.'" *American Paper Institute, Inc.* v. *American Electric Power Service Corp.*, No. 82-34 (May 16, 1983), slip op. 18, quoting *Clark* v. *Uebersee Finanz-Korporation, A.G.*, 332 U.S. 480, 489 (1947). Moreover, appellee construes the exception clause merely to defer the effective date of the offset provision until 1982. Nothing in the language or history of the 1977 amendments suggests this strained interpretation, however, and surely Congress would not have chosen the complex and circuitous formulation of the exception clause if its intention simply had been to specify the effective date of the statute. Such an "absurd" view of the exception clause is "to be avoided." *United States* v. *Turkette*, 452 U.S. 576, 580 (1981).[14]

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[13] See *Rosofsky* v. *Schweiker*, *supra*, 523 F. Supp. at 1185:

> In choosing the January 1977 date Congress selected a month that preceded the March 1977 Supreme Court decisions in the *Goldfarb*, *Jablon*, and *Silbowitz* cases * * *. If Congress had wished to provide the exception to male applicants without regard to dependency, it would certainly have selected a control date after the March 1977 Supreme Court decisions, not before.

[14] Furthermore, a separate provision of Section 334 expressly provides the effective date of the statute. See Section 334(*f*) of the

In addition, appellee's construction would frustrate the congressional purpose to protect the reasonable expectations of people whose retirement plans had been made in accordance with pre-*Goldfarb* law but to offset the dual pension and spousal benefits of those newly eligible for Social Security payments under *Goldfarb*. See, *e.g.*, *Watt* v. *Western Nuclear, Inc.*, No. 81-1686 (June 6, 1983), slip op. 20 ("[courts should] decline to construe * * * [statutory] language so as to produce a result at odds with the purposes underlying the statute [and i]nstead * * * [should] interpret the language of the statute in a way that will further Congress' overriding objective"). The legislative history speaks to this objective with unmistakable clarity, and the only reasonable explanation for Congress' selection of January 1977 as the critical date in the exception clause is to distinguish, in applying the offset provision, between people eligible under pre-*Goldfarb* and post-*Goldfarb* standards.[15] Appellee suggests no other basis for the choice of the January

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Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. V) 402 note ("[t]he amendments made by this section shall apply with respect to monthly insurance benefits payable under title II of the Social Security Act for months beginning with the month in which this Act is enacted, on the basis of applications filed in or after the month in which this Act is enacted").

[15] In *Webb* v. *Schweiker*, *supra*, the Ninth Circuit "believe[d] * * * that Congress did not intend to enact unconstitutional legislation" (701 F.2d at 82), and therefore it construed the exception clause to incorporate "only the *constitutional* requirements" (*id.* at 83; emphasis in original) of the Social Security Act in effect and being administered in January 1977. On this basis, and in light of *Goldfarb*, the court held that the exception clause does not require men to satisfy the one-half support test in order to avoid the pension offset. See also Mot. to Aff. 10-11. As we discuss below (see pages 27-42, *infra*), however, the exception is not rendered unconstitutional by the inclusion of the gender-based standard at issue here. Moreover, the court of appeals ignored the plain language and legislative history of the exception and the manifest congressional intent that underlies it.

1977 date and treats that provision as surplusage. Furthermore, he offers no reason why nondependent men—who were ineligible for Social Security benefits prior to March 1977—had any legitimate reliance interest that Congress might have sought to protect.[16]

For these reasons, appellee's interpretation of the exception clause to encompass men and women equally would defeat the statutory scheme carefully and deliberately drawn by Congress and would expand the exception "at great expense to the taxpayer" (*Kosofsky* v. *Schweiker*, *supra*, 523 F. Supp. at 1188). Accordingly, the pension offset exception should be construed to incorporate a gender-based dependency standard that requires men but not women to meet the pre-*Goldfarb* one-half support test in order to avoid the offset provision.

II. THE GENDER-BASED DEPENDENCY STANDARD INCORPORATED IN THE PENSION OFFSET EXCEPTION DOES NOT VIOLATE THE DUE PROCESS CLAUSE

As shown above, the pension offset exception incorporates the pre-*Goldfarb* standard requiring men but not women to meet the one-half support dependency test. The

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[16] The district court faulted Congress for "presum[ing] that women would have relied upon the practices of the Social Security Administration, yet men would not have relied upon a decision of the Supreme Court" (J.S. App. 5a). See also Mot. to Aff. 12-13. But surely Congress was entitled to believe that the longstanding reliance interests—of both women and dependent men—under the Act were more deserving of protection than the new-found interests of nondependent men who only became eligible for spousal benefits in March 1977 as a result of the decision in *Goldfarb*. Moreover, and at all events, Congress accommodated the interests of these nondependent men by providing (see page 4, *supra*) that the offset would apply only to applications filed in or after the month of enactment of the amendments. Section 334(f) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1546, 42 U.S.C. (Supp. V) 402 note. Thus, men who filed claims before December 1977 are not subject to the offset and therefore are eligible for full spousal benefits without regard to the one-half support test.

district court, while accepting this construction, invalidated the exception clause on the ground that such a gender-based dependency requirement violates the equal protection guarantee of the Due Process Clause of the Fifth Amendment. However, because the exception clause is not based on archaic and inaccurate sexual stereotypes but rather serves the important governmental objective of protecting the reliance interests of retirees, and because it is narrowly tailored and substantially related to the achievement of that objective, the gender-based dependency test incorporated in the exception does not violate due process.

A. A Gender-Based Classification Does Not Violate Due Process If It Substantially Serves An Important Governmental Objective Rather Than Reflecting Archaic And Inaccurate Sexual Stereotypes

As this Court has recognized, "[c]lassifications based upon gender * * * have traditionally been the touchstone for pervasive and often subtle discrimination." *Personnel Administrator* v. *Feeney*, 442 U.S. 256, 273 (1979). See also, *e.g.*, *Orr* v. *Orr*, 440 U.S. 268, 283 (1979). Often, these classifications merely "reflect[] archaic and stereotypic notions" (*Mississippi University for Women* v. *Hogan*, No. 81-406 (July 1, 1982), slip op. 6) and are based on "the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women" (*id.* at 7). For a statute to be valid, it "may not 'make overbroad generalizations based on sex which are entirely unrelated to any differences between men and women or which demean the ability or social status of the affected class.'" *Michael M.* v. *Sonoma County Superior Court*, 450 U.S. 464, 469 (1981) (plurality opinion), quoting *Parham* v. *Hughes*, 441 U.S. 347, 354 (1979) (plurality opinion of Stewart, J.). Nor is it proper for a legislature, in adopting a gender-based classification, to "act 'unthinkingly' or 'reflexively and not for any considered reason.'" *Rostker* v. *Goldberg*, 453 U.S. 57, 72 (1981) (citation omitted).

At the same time, "[i]t is clear that '[g]ender has never been rejected as an impermissible classification in all instances.'" *Rostker* v. *Goldberg*, *supra*, 453 U.S. at 69 n.7, quoting *Kahn* v. *Shevin*, 416 U.S. 351, 356 n.10 (1974). Thus, the Constitution does not prohibit a "'gender classification [that] is not invidious, but rather realistically reflects the fact that the sexes are not similarly situated.'" *Rostker* v. *Goldberg*, *supra*, 453 U.S. at 79, quoting *Michael M.* v. *Sonoma County Superior Court*, *supra*, 450 U.S. at 469 (plurality opinion).

In applying these principles, the Court's "cases have held • • • that the traditional minimum rationality test takes on a somewhat 'sharper focus' when gender-based classifications are challenged." *Michael M.* v. *Sonoma County Superior Court*, *supra*, 450 U.S. at 468 (plurality opinion). Accordingly, to satisfy the applicable constitutional standard, "'classification by gender must serve important governmental objectives and must be substantially related to achievement of those objectives.'" *Califano* v. *Webster*, 430 U.S. 313, 316-317 (1977), quoting *Craig* v. *Boren*, 429 U.S. 190, 197 (1976). See also, *e.g.*, *Mississippi University for Women* v. *Hogan*, *supra*, slip op. 5-8. Under this standard, "statutes • • • [have been] invalidated by this Court • • • that relied upon • • • simplistic, outdated assumption[s]" concerning gender and the role of women in society (*id.* at 8). Conversely, the Court has repeatedly upheld gender-based classifications that were supported by real economic or other relevant considerations.[17]

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[17] For example, in *Califano* v. *Webster*, *supra*, the Court sustained a Social Security formula that slightly favored women in the calculation of average monthly wages. The Court found the distinction constitutional because Congress had passed it in response to statistics indicating that it is more difficult for older women than older men to obtain reasonable employment and that older women, even if they find employment, are paid considerably lower wages. Similarly, in *Kahn* v. *Shevin*, *supra*, the Court upheld a state property tax exemption granted to widows but not widowers. Citing data indicating that

Califano v. *Goldfarb*, 430 U.S. 199 (1977), illustrates these doctrines. In *Goldfarb*, a five-to-four decision with no majority opinion, the plurality held that a gender-specific one-half support requirement, based as it was on " 'old notions' " and " 'archaic and overbroad' generalizations" about women, violated the Due Process Clause because it did not " 'serve important governmental objectives' " and was not "substantially related to the achievement of those objectives." 430 U.S. at 210-211; citations omitted. Similarly, Justice Stevens, in his decisive concurring opinion, observed "that Congress never focused its attention on the question whether to divide nondependent surviving spouses into two classes on the basis of sex. * * * It is fair to infer that habit, rather than analysis or actual reflection, made it seem acceptable to equate the terms 'widow' and 'dependent surviving spouse.' " 430 U.S. at 222 (Stevens, J., concurring). In light of this "automatic reflex" by Congress, Justice Stevens concluded that "this discrimination against a

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women's median incomes were substantially below those for men, and recognizing that "[t]he disparity is likely to be exacerbated for the widow * * * [who] in many cases * * * will find herself suddenly forced into a job market with which she is unfamiliar, and in which, because of her former economic dependency, she will have fewer skills to offer" (416 U.S. at 354; footnote omitted), the Court held that the differential treatment was justified. In *Schlesinger* v. *Ballard*, 419 U.S. 498 (1975), the Court upheld reduction-in-force statutes that allowed women Naval and Marine officers a longer period of tenure than men officers before being mandatorily discharged. Because women officers were generally ineligible for sea duty, the classification "reflects, not archaic and overbroad generalizations, but, instead, the demonstrable fact that male and female line officers in the Navy are *not* similarly situated with respect to opportunities for professional service." 419 U.S. at 508 (emphasis in original). Finally, the Court recently upheld all-male draft registration (*Rostker* v. *Goldberg*, *supra*) and the California statutory rape statute, under which only men can be criminally liable. *Michael M.* v. *Sonoma County Superior Court*, *supra*.

group of males is merely the accidental byproduct of a traditional way of thinking about females." *Id.* at 223.[18]

In the instant case the district court invalidated the exception clause on the basis of the *Goldfarb* decision. *Goldfarb*, however, arose in a much different context and does not compel the result reached by the court below. To the contrary, as we shall now demonstrate, the exception provision does not violate the Due Process Clause because it substantially advances an important governmental objective and is not based on archaic and discredited stereotypes.

B. The Exception Clause Substantially Serves The Important Governmental Objective Of Protecting The Reliance Interests Of Retirees

There can be no doubt that Congress, if it had wished, constitutionally could have reduced or eliminated the spousal benefits that existed in December 1977. See *United States Railroad Retirement Board* v. *Fritz*, 449 U.S. 166, 174, 177 (1980); *Hisquierdo* v. *Hisquierdo*, 439 U.S. 572, 575 (1979); *Califano* v. *Webster*, *supra*, 430 U.S. at 321; *Weinberger* v. *Salfi*, 422 U.S. 749, 772 (1975); *Flemming* v. *Nestor*, 363 U.S. 603, 608-611 (1960); see also *Frisbie* v. *United States*, 157 U.S. 160, 166 (1895). In addressing the fiscal problems resulting from the *Goldfarb* decision, however, Congress did not adopt such a harsh measure. The question in this case is whether the line drawn by Congress—based on the reliance interests of retirees under pre-*Goldfarb* law—is impermissible.

The pension offset exception is, of course, gender-neutral on its face. By its terms, it exempts from the offset provision "individual[s]" receiving or becoming eli-

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[18] Justice Stevens suggested, however, that he would have sustained the one-half support rule if it had been the result of a conscious "legislative decision to favor females in order to compensate for past wrongs, or a legislative decision that the administrative savings exceed the cost of extending benefits to nondependent widows." 430 U.S. at 222 (Stevens, J., concurring).

gible to receive government pensions within a five-year period who would have qualified for spousal benefits under the Social Security Act "as it was in effect and being administered in January 1977." Section 334(g)(1), 42 U.S.C. (Supp. V) 402 note. Thus, the exception applies to all individuals—men as well as women—who satisfy the January 1977 requirements for spousal benefits.[19]

Although the exception is facially neutral, it does incorporate the gender-specific dependency standard of pre-*Goldfarb* law. Accordingly, we turn to the issue whether the exception clause " 'serve[s an] important governmental objective[] and * * * [is] substantially related to achievement of th[at] objective[].' " *Califano* v. *Webster*, *supra*, 430 U.S. at 317, quoting *Craig* v. *Boren*, *supra*, 429 U.S. at 197.

1. *Protection of the Reliance Interests of Retirees Is an Important Governmental Objective*

The background and purpose of the pension offset and exception provisions have been fully explained above. See pages 17-27, *supra*. At the time of the *Goldfarb* decision, government retirees, unlike those in the private sector, were not subject to an offset provision that would deduct their pension benefits from Social Security spousal payments. In light of *Goldfarb*, many government retirees became entitled to double benefits that they had never expected to receive under the government pension and Social Security systems, and these windfall payments threatened to cause a serious financial strain on the Social Security trust fund. To alleviate this burden, Congress imposed an offset on government pensions identical to the offset that existed for private employees. In so

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[19] As previously discussed (see pages 20-27, *supra*), the exception clause was designed to protect the reliance interests of people—husbands and wives alike—who had retired or soon would retire and who had planned their retirements in accordance with pre-*Goldfarb* law. Indeed, equivalent to the actual provision, the exception could have been drafted explicitly in terms of this reliance interest. Cf. *United States* v. *Ptasynski*, No. 82-1066 (June 6, 1983), slip op. 12.

doing, however, Congress became concerned about government workers who were already or soon-to-be retired and who had planned their retirements on the assumption that they would receive spousal benefits under pre-*Goldfarb* law that would not be subject to an offset provision. To protect the reliance interests of these people, Congress enacted the exception clause to exempt from the offset all "individual[s]"—whether men or women—who were retired or would retire within five years and who could satisfy the pre-*Goldfarb* eligibility requirements as "in effect and being administered in January 1977."

The exception clause clearly furthers a legitimate and important governmental purpose: the protection of the legitimate reliance interests of retirees under pre-*Goldfarb* law.[20] *Cf. United States Railroad Retirement Board* v. *Fritz*, *supra*, 449 U.S. at 177; *id.* at 180-182 (Stevens, J., concurring in the judgment); *id.* at 195 (Brennan, J., dissenting). There can be no serious question, as Congress specifically concluded, that it is a significant and salutary goal to secure the retirement plans of our Nation's workers who in good faith had long and reasonably relied on the provisions of the Social Security Act. No citation of authority is necessary to establish that to these workers the protection of their retirement plans was of the utmost importance,[21] and Congress was not

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[20] At the same time, of course, Congress enacted the offset provision to eliminate the windfall benefits and reduce the financial difficulties of the Social Security trust fund that arose from the decision in *Goldfarb*, and the exception clause cannot be assessed in isolation from the offset itself. The purpose of the offset was of major importance in view of the fact that the Social Security system is a contributory and self-sustaining insurance plan rather than a welfare program funded out of general revenues. See *Califano* v. *Boles*, 443 U.S. 282, 296 (1979); see also *United States* v. *Lee*, 455 U.S. 252, 259 n.9 (1982).

[21] We do note that studies of the Social Security system confirm this self-evident proposition. For example, one prominent authority has found that "[f]or the great majority of Americans, the most important form of household wealth is the anticipated social security

required to ignore the serious hardships that could result from the unanticipated offset of spousal and pension benefits.

In addition to furthering the financial security of individual retirees and their families, the exception clause also promotes the collective interest of ensuring that citizens have confidence in the just and orderly processes of government. While not constitutionally required to do so, Congress surely was free to act in accordance with the principle that "'[g]reat nations, like men, should keep their word.'" *Astrup* v. *INS*, 402 U.S. 509, 514 n.4 (1971), quoting *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). See also *United States* v. *Realty Co.*, 163 U.S. 427, 436-444

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retirement benefits"; moreover, for most people, social security is viewed as a substitute for retirement savings, and those people will reduce private savings during their lifetime in anticipation of receiving retirement benefits. Feldstein, *Social Security, Induced Retirement, and Aggregate Capital Accumulation*, 82 J. Pol. Econ. 905, 905 (1974). See also C. Weaver, *The Crisis in Social Security* 185-187 (1982). Furthermore, in examining possible congressional responses to the *Goldfarb* decision, one commentator has expressly noted the need to protect the reliance interest of those nearing retirement:

> Many couples have undoubtedly made retirement plans and adjusted the level of their private saving and investment in anticipation of retirement benefits from social security which include a special benefit for a spouse. An abrupt denial of benefits in these cases, even if the spouse who would have received them is shown to be not truly dependent on the other is clearly inequitable since the couple's savings and retirement plans would have been different had the spouse benefit not been anticipated. Thus, were it to be decided that wives should prove dependency in order to receive spouse benefits, a strong argument could be made for making such a change gradually so as to avoid inequities to couples approaching retirement who had anticipated that such benefits would be available to them and had made their retirement plans accordingly.

M. Flowers, *Women and Social Security: An Institutional Dilemma* 41 (1977).

(1896); *United States Railroad Retirement Board* v. *Fritz*, *supra*, 449 U.S. at 180 (Stevens, J., concurring in the judgment).

These two related interests—that of the individual in equitable treatment and that of the Nation in governmental regularity and fairness—are often implicated when a statute is amended, and they are reflected in the common use of "grandfather" clauses that make such amendments effective prospectively in recognition of the legitimate reliance on the prior law. This Court has repeatedly sustained such grandfather clauses. See, *e.g.*, *United States Railroad Retirement Board* v. *Fritz*, *supra*, 449 U.S. at 177-179; *New Orleans* v. *Dukes*, 427 U.S. 297, 303-306 (1976); *United States* v. *Maryland Savings-Share Insurance Corp.*, 400 U.S. 4, 6 (1970) (collecting cases); cf. *Califano* v. *Webster*, *supra*, 430 U.S. at 320-321. The exception provision in the Social Security Amendments of 1977 is a similar kind of grandfather clause that "reinforces * * * [the] prospective nature [of the offset]" (H.R. Conf. Rep. No. 95-837, *supra*, at 72; S. Conf. Rep. No. 95-612, *supra*, at 72). That the exception clause includes not only those who had retired but also those who would retire within five years does not alter the basic character of the clause, since, of necessity in the area of retirement, a transitional period was required to "avoid[] penalizing people who are * * * close to retirement * * * and who cannot be expected to readjust their retirement plans to take account of the 'offset' provision that will apply in the future" (H.R. Conf. Rep. No. 95-837, *supra*, at 72; S. Conf. Rep. No. 95-612, *supra*, at 72).

Moreover, this Court has recognized the legitimacy and importance of reliance interests in a number of doctrinal areas involving a change in the law—for example, the retroactivity of a new decision,[22] the propriety and ex-

[22] See, *e.g.*, *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, No. 81-150 (June 28, 1982), slip op. 37-38 (plurality opinion); *United States* v. *Peltier*, 422 U.S. 531, 541-542 (1975);

tent of retrospective judicial relief,[23] the applicability of a statutory amendment to a pending case,[24] and the immunity of governmental officials who acted in accordance with prior law.[25] At bottom, all of these doctrines require "reconciling the * * * interests reflected in a new rule of law with reliance interests founded upon the old * * *" (*Lemon* v. *Kurtzman*, *supra*, 411 U.S. at 198 (plurality opinion)), and they "recogni[ze] that statutory or even judge-made rules of law are hard facts on which people must rely in making decisions and in shaping their conduct" (*id.* at 199). Indeed, in order to allow a proper transition to a new rule of law, this Court on occasion has stayed a judgment of unconstitutionality and expressly allowed an invalid statute to remain in effect for a specified period of time.[26] Congress, no less than the judiciary, is entitled to "weigh[] the inequity" (*Chevron Oil Co.* v. *Huson*, *supra*, 404 U.S. at 107) resulting from a change in law and to limit the new rule in a way that avoids "'injustice or hardship'" (*ibid.*; citation omitted).[27]

Chevron Oil Co. v. *Huson*, 404 U.S. 97, 106-107 (1971); see also *Griffin* v. *Illinois*, 351 U.S. 12, 26 (1956) (Frankfurter, J., concurring in the judgment).

[23] See, *e.g.*, *Los Angeles Department of Water and Power* v. *Manhart*, 435 U.S. 702, 721-723 (1978); *Lemon* v. *Kurtzman*, 411 U.S. 192, 198-199, 203, 206-208 (1973) (plurality opinion).

[24] See, *e.g.*, *Bradley* v. *Richmond School Board*, 416 U.S. 696, 717, 720-721 (1974).

[25] See *Procunier* v. *Navarette*, 434 U.S. 555, 565 (1978).

[26] See *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, *supra*, slip op. 38 (plurality opinion); *Buckley* v. *Valeo*, 424 U.S. 1, 142-143 (1976).

[27] *Lemon* v. *Kurtzman* is especially pertinent here. In that litigation, a state statute providing aid to sectarian schools was invalidated under the Establishment Clause. See *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971) (*Lemon I*). Thereafter, the district court allowed the state to reimburse the schools for expenses they had incurred in reliance on the statute prior to the decision in *Lemon I*. In *Lemon* v. *Kurtzman*, 411 U.S. 192 (1973) (*Lemon II*), this

Finally, the legitimacy and importance of the reliance interests protected by the exception clause are underscored by the decision in *United States Railroad Retirement Board* v. *Fritz*, *supra*. In *Fritz*, this Court rejected an equal protection challenge to a grandfather provision in the Railroad Retirement Act of 1974, 45 U.S.C. (& Supp. V) 231, that, like the present case, exempted specified classes of employees from the elimination of certain dual retirement benefits. In sustaining the rationality of the statute (449 U.S. at 174, 177), the Court noted that Congress could properly protect the economic "expectations" (*id.* at 177) of certain classes of employees by means of a grandfather provision, and that the applicability of such a grandfather provision could be limited to those employees having the "greater equitable claim to [unreduced] benefits" (*id.* at 178). Congress has sought to achieve the same results here. As in *Fritz*, Congress acted to eliminate dual retirement benefits while at the same time protecting those present and future retirees who legitimately relied on the receipt of such benefits. In both instances Congress attempted to preserve the integrity of the federal treasury while recognizing the relative equities of those affected by the change in the law. The congressional objectives behind the exception clause in this case, implemented through a gender-based classification to reflect the relevant reliance interests, are neither less justifiable nor less substantial than those upheld in *Fritz*. See also *United States* v. *Realty Co.*, *supra*, 163 U.S. at 436-444.

Court affirmed the district court's order over the dissent of Justice Douglas that such reimbursement was as much a violation of the Establishment Clause as the payment in *Lemon I*. In the instant case, as in *Lemon II*, there was a legitimate and important need for a brief transition period to accommodate reliance interests formed under the prior law even though such a transition might be said to be, in some senses, a continuation of the unconstitutional statute. See also *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, *supra*, slip op. 39 (plurality opinion); *Buckley* v. *Valeo*, *supra*, 424 U.S. at 142-143.

Accordingly, in light of the well-established recognition of reliance interests in the law and the significance of Social Security benefits to people who had planned their retirements in accordance with pre-*Goldfarb* rules, it is clear that the exception clause was designed to serve the legitimate and important governmental objective of protecting the reliance interests of retirees.

2. *The Exception Clause Is Substantially Related to Achievement of the Objective of Protecting the Reliance Interests of Retirees*

Given that the protection of the reliance interests of retirees is a legitimate and important governmental objective, it must be determined whether the exception clause is "substantially related to [the] achievement of th[at] objective[]." *Califano* v. *Webster*, *supra*, 430 U.S. at 317. "The purpose of requiring that close relationship is to assure that the validity of a classification is determined through reasoned analysis rather than through the mechanical application of traditional, often inaccurate, assumptions about the proper roles of men and women." *Mississippi University for Women* v. *Hogan*, *supra*, slip op. 7.

There can be little doubt in this case that the exception clause is substantially related to Congress' objective. By incorporating the January 1977 eligibility standard for those who were or soon would be retired, the exception clause is specifically and precisely tailored to the group that made retirement plans under pre-*Goldfarb* law. People within this group are the only ones who could have expected to retire with unreduced benefits in accordance with the Social Security program prior to *Goldfarb*, and their reliance interests are protected by the exception to the offset. Conversely, people not eligible under the January 1977 standard had no such expectation but rather qualified for spousal benefits only as a result of the *Goldfarb* decision; these people, having no reliance interest to be protected, are excluded from the exception, and thus the offset provision is applicable to eliminate their

dual benefits.[28] See *Michael M.* v. *Sonoma County Superior Court*, *supra*, 450 U.S. at 469 (plurality opinion), quoting *Rinaldi* v. *Yeager*, 384 U.S. 305, 309 (1966), and *Tigner* v. *Texas*, 310 U.S. 141, 147 (1940) ("the 'equal protection' clause * * * does not require things which are different in fact * * * to be treated in law as though they were the same"); see also *Anderson* v. *Celebrezze*, No. 81-1635 (Apr. 19, 1983), slip op. 20.

In addition, the exception clause incorporating the pre-*Goldfarb* standard is limited to a five-year period. In light of the nature of retirement planning, Congress appropriately concluded that this was a reasonable length of time that "avoids penalizing people who are already retired, or close to retirement, from public employment and who cannot be expected to readjust their retirement plans to take account of the 'offset' provision that will apply in the future" (H.R. Conf. Rep. No. 95-837, *supra*, at 72; S. Conf. Rep. No. 95-612, *supra*, at 72). By confining this provision to a brief "transitional exception" (123 Cong. Rec. 39134 (1977) (remarks of Sen. Long)), Congress adopted a narrowly tailored and focused means of achieving its objectives.

Furthermore, the exception clause clearly represents a "reasoned analysis" (*Mississippi University for Women* v. *Hogan*, *supra*, slip op. 7) by Congress of the situation confronting the Social Security system. Cf. *Rostker* v. *Goldberg*, *supra*, 453 U.S. at 74 ("[t]he issue was considered at great length, and Congress clearly expressed its purpose and intent"); compare *Califano* v. *Westcott*, 443 U.S. 76, 87 (1979) (the provision at issue "escaped virtually unnoticed" by Congress). The legislative record discussed above (see pages 17-27, *supra*) shows that Con-

[28] We again note that the offset itself does not apply to anyone, including nondependent men, who filed a valid application for spousal benefits prior to December 1977. See page 4 and note 16, *supra*. Any reliance interests of these people thus have been accommodated in the starting date of the offset provision rather than through the exception clause.

gress focused directly on the financial problem caused by the *Goldfarb* decision, solved that problem by enacting a pension offset provision comparable to the offset that already applied to private-sector employees, and then included a carefully limited exception clause to prevent the offset from unfairly affecting a discrete class of Social Security recipients. Taken together, the offset provision and exception clause constitute a reasonable solution to a complex and difficult problem.

Indeed, in adopting the offset and exception provisions, Congress considered and rejected alternative approaches that it deemed less desirable. For example, the House version of the 1977 amendments recommended that a six-month HEW study on equal treatment for men and women under Social Security "[i]nclude[] * * * various proposals to mitigate the cost impact of the recent *Goldfarb* decision on the system." Staff of the House Comm. on Ways and Means, 95th Cong., 1st Sess., *WMCP: 95-57 Summary of the Principal Provisions of H.R. 9346, The Social Security Financing Amendments of 1977 As Passed By the House* 4 (Comm. Print 1977). See also *House Hearings, supra*, at 121 (statement of Wilbur J. Cohen). This suggestion for further study ultimately was rejected in favor of immediate action to eliminate windfall benefits and ease the financial burden on the Social Security trust fund. As another alternative, the Carter administration proposed a modified dependency test that would be applicable to men and women equally and would require the spouse with the lower income for the three-year period prior to retirement to prove dependency on the other spouse. See *House Hearings, supra*, at 5, 10, 67-68; *Senate Hearings, supra*, at 44, 45. Although this proposal was intended "to mitigate the cost impact of" *Goldfarb* (*House Hearings, supra*, at 10) and would have resulted in far lesser payments of dependents' benefits than would a pension offset (*Senate Hearings, supra*, at 45), it, too, was rejected for the offset after Congress specifically con-

sidered the two measures. See S. Rep. No. 95-572, *supra*, at 28; *House Hearings*, *supra*, at 67-68; see also *id.* at 121.[29]

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[29] As the Senate explained:

> Consideration was given to requiring claimants to prove their dependency on the worker before entitling them to spouses' benefits. However, a dependency test would be subject to manipulation. For example, a government employee with earnings higher than those of his wife could qualify for a social security spouse's benefit by allowing a few months to intervene between the date of his retirement and the effective date of his pension. Also, a dependency test could deny spouses' benefits in situations where it would seem undesirable to deny such benefits. For example, a woman might, in fact, be dependent upon her husband for most of her life and might have earned little or nothing in the way of retirement income protection in her own right and yet be denied benefits if a dependency test were implemented. This could occur if her husband became ill shortly before reaching retirement age, thus forcing a temporary reversal of their usual dependency situation. Additionally, a dependency test would require substantial numbers of persons to provide information with regard to their total income in order to establish entitlement, a significant departure from present practice where income is not generally a factor in entitlement. Making such determinations would also create administrative difficulties. For these reasons, the committee believes an offset is preferable to a dependency test.

S. Rep. No. 95-572, *supra*, at 28.

The district court, in rejecting "administrative convenience" as a justification for the gender-based standard incorporated in the exception clause (J.S. App. 6a) and suggesting that a dependency test would have been preferable (*id.* at 5a), clearly misunderstood the basis for Congress' action. First, the problem of "administrative difficulties" cited in the Senate Report was only one of several reasons that led Congress to reject a dependency requirement. Moreover, this Court has never suggested, as the district court did, that administrative considerations are either irrelevant or illegitimate as justifications for a gender-based statute; quite the contrary, the Court has acknowledged that there "may be * * * levels of administrative convenience that will justify discriminations that are subject to heightened scrutiny under the Equal Protection Clause" (*Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142, 152 (1980)). Administrative practicalities are especially significant

In enacting the pension offset exception, therefore, Congress was not motivated by a sexist animus, nor did it intend to effectuate and perpetuate discredited stereotypes regarding the proper roles and perceived frailties of women. Rather, the exception clause is substantially related to the protection of the reliance interests of retirees under pre-*Goldfarb* law and is narrowly drawn to achieve that unquestionably legitimate governmental objective. Moreover, Congress carefully focused on the offset provision and exception clause, and it deliberately chose that approach over other alternatives. In these circumstances, the constitutionality of the exception clause should be sustained.[30]

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with respect to the Social Security Act. See, *e.g.*, *Heckler* v. *Campbell*, No. 81-1983 (May 16, 1983), slip op. 2 n.2, 10; *Mathews* v. *Lucas*, 427 U.S. 495, 509-510 (1976); *Weinberger* v. *Salfi*, 422 U.S. 749, 781-785 (1975). Finally, the district court overstepped proper judicial bounds in so lightly casting aside, without "[t]he customary deference accorded the judgments of Congress," the policy choices "specifically considered" by Congress. *Rostker* v. *Goldberg*, *supra*, 453 U.S. at 64.

[30] As is evident from the foregoing discussion, the decision in *Califano* v. *Goldfarb*, invalidating the one-half support test as a substantive rule of eligibility, does not require that the exception clause in this case be held unconstitutional. The gender-based classification incorporated in the exception clause was a conscious and deliberate enactment by Congress to further a legitimate and important objective that was unrelated to the presumed dependency of women or other sexual stereotypes; in contrast, *Goldfarb* involved an " 'archaic and overbroad' generalization[]" about the roles of men and women (430 U.S. at 210-211 (plurality opinion)) and was an "accidental byproduct of a traditional way of thinking about females" on which "Congress never focused its attention" (*id.* at 222-223) (Stevens, J., concurring)). Moreover, and again unlike *Goldfarb*, the exception clause is narrowly tailored and substantially related to the achievement of the congressional objective. The gravamen of the exception is not gender but rather the historical fact of reliance—by men as well as women—on prior law, and the exception is carefully limited to that purpose.

III. THE SEVERABILITY CLAUSE IN SECTION 334 IS CONSTITUTIONAL AND, IN THE EVENT THE PENSION OFFSET EXCEPTION IS INVALIDATED, RENDERS THE OFFSET APPLICABLE WITHOUT EXEMPTION

In addition to containing the pension offset exception, Section 334(g) also includes a severability clause:

> If any provision of this subsection [subsection (g)], or the application thereof to any person or circumstance, is held invalid, the remainder of this section [Section 334] shall not be affected thereby, but the application of this subsection to any other persons or circumstances shall also be considered invalid.

Section 334(g)(3) of the Social Security Amendments of 1977, Pub. L. No. 95-216, 91 Stat. 1547, 42 U.S.C. (Supp. V) 402 note. The district court struck down this severability clause as "an unconstitutional usurpation of judicial power by the legislative branch of the government" (J.S. App. 7a) and an "attempt to discourage the bringing of an action [to challenge the exception] by destroying standing" (*id.* at 8a). Furthermore, having invalidated the severability clause, the court ordered that the exemption to the offset be extended to men as well as women without regard to dependency, notwithstanding that such relief would "create a financial drain upon the Social Security fund" (*id.* at 9a).

Contrary to the district court's ruling, the severability clause is not an unconstitutional usurpation of judicial authority but rather a wholly proper statement of congressional intent on the meaning and application of the statute. Moreover, the severability clause does not unconstitutionally divest a plaintiff of standing to challenge the validity of the exception provision. Finally, by ignoring the clear congressional intent behind the severability clause and extending Social Security benefits to a class of claimants precluded by statute from receiving them, the district court has arrogated to itself the powers rightly belonging to Congress and has encroached upon

the legislative province of making policy choices and allocating limited funds.

On its face, the severability clause in Section 334(g)(3) provides that "[i]f any provision of * * * subsection [(g), which includes the exception provision] * * * is held invalid, the remainder of * * * section [334, which includes the offset] shall not be affected thereby, but the application of * * * subsection [(g)] to any other persons or circumstances shall also be considered invalid." By this section, Congress expressed its intention that, in the event the exception provision were held unconstitutional, (1) the offset provision would "not be affected thereby" and would continue in full force and effect, and (2) the exception provision would "be considered invalid" in all respects and in all applications, thereby leaving the offset to stand without exemption and foreclosing the possibility that the exception would be expanded to include additional people beyond those intended by Congress.

The legislative history confirms this congressional understanding that, if the exception provision were invalidated, the severability clause would both preserve the offset intact and excise rather than enlarge the exception. This purpose was explained in the Conference Reports in unmistakable terms:

> A separability clause is included for the exception clause * * * so that if [the exception] is found invalid the pension-offset * * * would not be affected, and the application of the exception clause would not be broadened to include persons or circumstances that are not included within it.

H.R. Conf. Rep. No. 95-837, *supra*, at 72; S. Conf. Rep. No. 95-612, *supra*, at 72. Likewise, Senator Long, in submitting the Conference Report to the Senate for approval, made clear that ["i]n the event the courts find it impermissible to afford this protection [in the exception provision] to those who anticipated receiving their spouses benefits prior to March 1977 without providing it also to those who would qualify only as a result of a

March 1977 court decision, the bill provides that *the entire exception would become inoperative so that the reduction in benefits would be applied in all cases.*" 123 Cong. Rec. 39134 (1977) (emphasis added). Senator Long's explanation was subsequently repeated in the Senate Finance Committee's analysis of the final bill. See *Senate Comm. Print, supra*, at 7.

Nothing in the severability clause or its legislative history suggests any "unconstitutional usurpation of judicial power by the legislative branch of the government" (J.S. App. 7a). To the contrary, Congress acted well within its recognized authority in defining with precision the scope of the statute it was enacting in the event one portion were held invalid. The issue of severability turns on whether " 'the Legislature would not have enacted those provisions which are within its power, independently of that which is not.' " *Buckley* v. *Valeo*, 424 U.S. 1, 108 (1976), quoting *Champlin Refining Co.* v. *Corporation Commission*, 286 U.S. 210, 234 (1932). See also, *e.g.*, *INS* v. *Chadha*, No. 80-1832 (June 23, 1983), slip op. 10-11; *United States* v. *Jackson*, 390 U.S. 570, 585 n.27 (1968); *Crowell* v. *Benson*, 285 U.S. 22, 63 (1932). Severability involves "a question of interpretation and of legislative intent. • • • The task • • • [is to] determin[e] the intention of the • • • legislature • • •." *Dorchy* v. *Kansas*, 264 U.S. 286, 290 (1924). See also *Williams* v. *Standard Oil Co.*, 278 U.S. 235, 241 (1929). And where, as here, "we are seeking to ascertain the congressional purpose [regarding severability], we must give heed to [an] explicit declaration [by Congress]." *Electric Bond & Share Co.* v. *SEC*, 303 U.S. 419, 434 (1938).

In this case, "Congress has defined its intent as to separability." *Electric Bond & Share Co.* v. *SEC*, *supra*, 303 U.S. at 434; see also *Califano* v. *Westcott*, 443 U.S. 76, 95 (1979) (Powell, J., concurring in part and dissenting in part). Section 334(g)(3) plainly expresses Congress' view that, if the exception clause were unenforceable in

any way, the offset provision should remain in effect and the exception should be eliminated in its entirety. In other words, Congress unambiguously stated that it would not have enacted the exception clause at all—thus applying the offset provision to all individuals without qualification—if it "had been advised of the invalidity of part." *Hill* v. *Wallace*, 259 U.S. 44, 71 (1922); cf. *Brookins* v. *O'Bannon*, 699 F.2d 648, 655 (3d Cir. 1983) (nonseverability clause in a state welfare statute was not an unlawful burden on the right to judicial redress because the clause "does no more than express the legislature's intention to repeal [the statute] unless [it] * * * is enforceable"). That Congress, through the severability clause, removed any "hesitation or doubt" that might otherwise have existed in this regard (*Hill* v. *Wallace*, *supra*, 259 U.S. at 71) raises no separation-of-powers issue.[31]

The district court, however, conceived the severability clause to be an effort by Congress "to mandate the outcome of any challenge to the validity of the exception by making such a challenge fruitless" (J.S. App. 8a) and thus an "attempt to discourage the bringing of an action by destroying standing" (*ibid.*). We submit that there is simply no basis for the district court to ignore the evident and legitimate purpose of the severability clause as discussed above or to impugn the integrity and good faith of Congress.

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[31] The district court also found "a conflicting expression of Congressional intent" between "Congress' avowed intent to protect the expectation and reliance interests of" retirees and the directive in the severability clause to "destroy the five-year grace period, along with the remainder of the pension offset exception, if any part of the exception is held invalid" (J.S. App. 8a). The text and history of the statute, however, plainly reveal the congressional judgment that the protection of reliance interests is subsidiary to the elimination of dual benefits and the reduction of social security costs. The severability clause evidences Congress' considered conclusion that, should the courts determine that the pension offset exception cannot be limited to the class it defined, reliance and expectation interests must give way to the overriding policy underlying the pension offset provision of the 1977 legislation.

We also submit that the validity of the severability clause does not bear on a plaintiff's standing to sue and that the issue cannot properly be analyzed in those terms. "In essence the question of standing is whether the litigant is entitled to have the court decide the merits of the dispute or of particular issues. * * * In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art. III." *Warth* v. *Seldin*, 422 U.S. 490, 498 (1975). There can be no doubt in this case that appellee, as a person subject to the offset and not eligible for the statutory exception, has asserted "a distinct and palpable injury to himself" (*id.* at 501) and " 'alleged such a personal stake in the outcome of the controversy as to assure th[e necessary] concrete adverseness.' " *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 72 (1978), quoting *Baker* v. *Carr*, 369 U.S. 186, 204 (1962); see *Orr* v. *Orr*, 440 U.S. 268, 272-273 (1979). While the validity of the severability clause would limit the relief that could be granted appellee if he prevailed on the merits of his cause of action, it does not prevent him from presenting his claim to the court for adjudication. See *Davis* v. *Passman*, 442 U.S. 228, 239 n.18 (1979).

At all events, even viewing the issue as one of standing, the district court incorrectly concluded that the severability clause could deprive appellee of standing to challenge the validity of the exception clause. The court's conclusion was in error for two independent reasons.

First, the existence of the severability clause does not so incontrovertibly foreclose appellee's claim to spousal benefits that he lacks standing. While Section 334(g)(3) is a strong indication of congressional intent, it is, like all severability provisions, no more than an "aid in determining that intent * * * [and] not an inexorable command." *Dorchy* v. *Kansas*, *supra*, 264 U.S. at 290. In the end, "[t]he task of determining the intention of the * * * legislature in this respect * * * rests * * * upon

the * * * court" (*ibid.*). For example, it is possible that a court might construe the clause not to apply in the particular circumstances of a given case. In addition, a court could—as the district court did here—hold the clause unconstitutional. In either event, appellee would become entitled to spousal benefits. Although these outcomes might be thought unlikely in view of the language, history, and purpose of the severability clause, they are not so inconceivable or remote that appellee was without a colorable claim to benefits. Cf. *Association of Data Processing Service Organizations, Inc.* v. *Camp*, 397 U.S. 150, 153 (1970). At the time this lawsuit was filed, all that could be said was that appellee " 'may or may not ultimately win' " such relief. *Orr* v. *Orr*, *supra*, 440 U.S. at 273, quoting *Stanton* v. *Stanton*, 421 U.S. 7, 17 (1975). This possibility of a judicial remedy awarding appellee spousal benefits was sufficient to confer standing.

Second, the premise of the district court's conclusion—that appellee must be entitled to monetary relief in order to have standing here—is unfounded. The right advanced by appellee in challenging the exception provision is the right to the equal protection of the laws as guaranteed by the Due Process Clause. More specifically, in the context of this litigation, it is the right not to be subject to an impermissible gender-based classification but instead "to be treated equally with other [applicants] as regards * * * benefits." *Califano* v. *Goldfarb*, *supra*, 430 U.S. at 212 (plurality opinion); cf. *Iowa-Des Moines National Bank* v. *Bennett*, 284 U.S. 239, 247 (1931). The Due Process Clause, however, does not ensure a particular substantive outcome or entitle appellee to spousal as well as pension benefits from the government; appellee has no constitutional right to the windfall of a dual allowance. By obtaining a judicial decree that the exception provision violates the Due Process Clause, appellee vindicated his constitutional right in its entirety and achieved the "personal benefits" (J.S. App. 8a) of being eligible for

spousal benefits on the same terms as women.[32] Hence, the severability clause would not destroy appellee's standing to challenge the exception provision even if it were assumed from the outset of the case that the exception is not severable and therefore that appellee would not be entitled to receive spousal benefits.[33]

This Court has often considered the "inherent problem of challenges to underinclusive statutes" (*Orr* v. *Orr*, *supra*, 440 U.S. at 272) and the "remedial alternatives" of "extension" and "nullification" (*Califano* v. *Westcott*, *supra*, 443 U.S. at 89). See also, *e.g.*, *Welsh* v. *United States*, 398 U.S. 333, 361-367 (1970) (Harlan, J., concurring in the result). In no case, however, has the

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[32] In effect, appellee is in no different position than if judicial relief were limited to a declaratory judgment or if monetary damages were barred by the doctrine of sovereign immunity. In those circumstances as in the present one, the question of remedy would neither affect appellee's standing to litigate the issue whether his personal right to due process has been violated nor deprive a federal court of jurisdiction to decide that issue. Cf. *United States* v. *Testan*, 424 U.S. 392, 399-407 (1976); *Steffel* v. *Thompson*, 415 U.S. 452, 462-463, 466-472 (1974); *Powell* v. *McCormack*, 395 U.S. 486, 517-518 (1969); *Aetna Life Insurance Co.* v. *Haworth*, 300 U.S. 227, 240-241 (1937).

[33] The district court also asserted (J.S. App. 8a) that the severability clause would eliminate the incentive of prospective plaintiffs to contest the validity of the exception. But many features of litigation—the requirement of exclusive venue in an inconvenient forum, the unavailability of attorney's fees, or limitations on relief such as sovereign immunity—may affect a plaintiff's willingness to file suit; a district court's assessment of the adequacy of incentives to sue is simply not a legitimate ground on which to strike down an otherwise valid statute. Moreover, we disagree that interested litigants lack an incentive to question the exception provision in light of the severability clause. If a court were to hold that the line drawn by Congress in Section 334(g)(1) was unconstitutional, Congress would have the opportunity to reconsider the matter and extend benefits without regard to dependency; indeed, such reconsideration is made more likely if the judicial relief denies benefits to a class that Congress clearly intended to be eligible, and especially so where, as here, Congress on its own has returned to the statute on two occasions subsequent to the original enactment (see note 4, *supra*).

Court even suggested that it would "den[y] a plaintiff standing on [the] ground" that the nullification rather than the extension of benefits would "thwart[]" the plaintiff's claim (*Orr* v. *Orr*, *supra*, 440 U.S. at 272). Rather, in cases from state courts involving the constitutionality of state provisions, this Court consistently has remanded for consideration of the relief issue as a matter of *state* law in light of the *federal* holding that the provision was substantively invalid. See, *e.g.*, *Wengler* v. *Druggists Mutual Insurance Co.*, 446 U.S. 142, 152-153 (1980); *Orr* v. *Orr*, *supra*, 440 U.S. at 272-273, 283-284; *Stanton* v. *Stanton*, 421 U.S. 7, 17-18 (1975), 429 U.S. 501 (1977); *Skinner* v. *Oklahoma*, 316 U.S. 535, 542-543 (1942). These decisions indisputably recognize that the issue of relief—that is, the issue of denial or extension of benefits to correct the gender-based discrimination—is not part of the federal constitutional right to equal protection. And at least one federal court has ordered the denial rather than the extension of benefits to remedy an unconstitutional gender-based dependency test in the Social Security Act, without suggesting that the plaintiff was thereby deprived of standing or that his constitutional rights were rendered nugatory. See *Moss* v. *Secretary of HEW*, 408 F. Supp. 403, 411-415 (M.D. Fla. 1976).

The severability clause in Section 334(g)(3) presents a compelling case for the invalidation, rather than the extension, of the exception provision. See *INS* v. *Chadha*, *supra*, slip op. 11. And contrary to the district court's conclusion, the severability clause does not usurp the authority of the judiciary. Quite the opposite, it is the district court that has improperly intruded upon the powers of a co-equal branch of government. "Governmental decisions to spend money to improve the general public welfare in one way and not another are 'not confided to the courts. The discretion belongs to Congress * * *.'" *Mathews* v. *De Castro*, 429 U.S. 181, 185 (1976) (citation omitted). See also, *e.g.*, *Califano* v. *Torres*, 435 U.S.

1, 5 (1978); *Maher* v. *Roe*, 432 U.S. 464, 479-480 (1977). Thus, "[w]henever a court extends a benefits program to redress unconstitutional underinclusiveness, it risks infringing legislative prerogatives" (*Califano* v. *Westcott*, *supra*, 443 U.S. at 92). Here, the district court's extension of the exception provision to appellee flies squarely in the face of the clear language and history of Section 334(g) and, in disregard of the plain congressional intent, requires the Social Security trust fund to continue to bear the substantial burden of windfall payments to people ineligible for benefits under the Act.[34] See *Hill* v. *Wallace*, *supra*, 259 U.S. at 71; *Califano* v. *Westcott*, *supra*, 443 U.S. at 94 (Powell, J., concurring in part and dissenting in part).

In sum, by realigning Social Security benefits in a way that Congress clearly foreclosed, the district court failed to respect and abide by the considered policy choice of a "democratic branch[] of the Government" (*Califano* v. *Westcott*, *supra*, 443 U.S. at 93). Instead, by extending the exception clause to all claimants without regard to dependency or reliance interests, the district court effectively has nullified the offset provision and thus recreated the fiscal problem that Congress sought to avoid in 1977. Accordingly, if the exception provision is held to be unconstitutionally underinclusive, it should be invalidated in its entirety, as Congress intended, rather than extended to appellee and the class he represents.

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[34] The Social Security Administrative estimates that the 1977 offset provision with the exception clause reduced Social Security expenditures by more than $190 million for the period of calendar years 1978-1982 and will save in excess of $900 million over the period 1983-1986.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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JUNE 1983

☆ U. S. GOVERNMENT PRINTING OFFICE: 1983 409481 14